TIC-The Industrial Company *and* International Brotherhood of Electrical Workers, AFL–CIO, Local Union 584. Case 17–CA–17435

April 8, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND FOX

On December 11, 1995, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, TIC-The Industrial Company, Steamboat Springs, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraph accordingly.

''(b) Refusing to reinstate economic strikers, who have unconditionally offered to return to work, to their former, or substantially equivalent, employment positions when they become available.''

2. Delete paragraph 2(d) and insert the following in its place.

''(d) Mail a copy of the attached notice marked 'Appendix'[3] to all employees in the electricians craft, including licensed journeymen, craftsmen, helpers and laborers, who were employed by the Respondent at its National Gypsum Company jobsite in Pryor, Oklahoma, at any time from the onset of the unfair labor practices found in this case until the completion of these employees' work at that jobsite. Such notice shall be mailed to the last known address of each of the employees above. Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be mailed immediately upon receipt by the Respondent, as directed above.

''[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading 'Mailed by Order of the National Labor Relations Board' shall read 'Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.'''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to mail this notice and abide by it.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate and enforce any rule prohibiting employees from discussing the Union during working hours.

WE WILL NOT refuse to reinstate economic strikers, who have unconditionally offered to return to work, to

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The General Counsel has excepted to the judge's recommendation that the Board's remedial notice be posted at the Respondent's facility in Pryor, Oklahoma. The General Counsel asserts that the Respondent has no facility at this location, that the work performed by the Respondent's employees in the electricians craft at the Pryor jobsite has been completed, and that those employees have been laid off. Accordingly, the General Counsel requests, in lieu of posting the notice, that it be mailed to all of the electricians-craft employees who worked at the Pryor jobsite from the time the ''Respondent failed to reinstate [discriminatees] Roy and Gene Sheppard to work on the project'' until the completion of those employees' work at the jobsite. We will require the Respondent to mail the notice to its electricians-craft employees who were employed at any time from the onset of the unfair labor practices until the completion of those employees' work at the Pryor jobsite. In the circumstances of this case, we find that this is an appropriate method of insuring that employees are informed of our Decision and Order. See, e.g., *3E Co.*, 313 NLRB 12 fn. 2 (1993), enfd. 26 F.3d 1 (1st Cir. 1994). We will modify the Order accordingly. In addition, we will modify the Order to correct the judge's inadvertent failure to include an order that the Respondent cease and desist from its unlawful refusal to reinstate economic strikers.

their former, or substantially equivalent, employment positions when they become available.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer former economic strikers Gene Sheppard and Roy Sheppard immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from our unlawful refusal to recall them after their unconditional offers to return to work, less any interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to the refusal to recall him and that the refusal will not be used against him in any way.

TIC-THE INDUSTRIAL COMPANY

Stephen E. Wamser, Esq., for the General Counsel.
William F. Schoeberlein, Esq. (Otten, Johnson, Robinson, Neff & Ragonetti), of Denver, Colorado, for the Respondent.
James E. McCarty, of Tulsa, Oklahoma, for the Union.

DECISION

INTRODUCTION

ALBERT A. METZ, Administrative Law Judge. This case was heard at Tulsa, Oklahoma, on October 10–11, 1995.[1] The International Brotherhood of Electrical Workers, AFL–CIO, Local Union 584 (the Union) has charged that TIC-The Industrial Company (the Respondent) violated 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The primary issues are whether Respondent violated the Act by failing to recall Gene and Roy Sheppard to work, promulgating a no-solicitation rule, and discharging Lynn Holloway. I find that the Respondent violated Section 8(a)(1) of the Act by refusing to rehire the Sheppards and in promulgating a no-solicitation rule. I conclude the Respondent did not violate the Act by discharging Holloway.

1. Background

Respondent is a nationwide contractor for large construction projects. During 1994 it was engaged to work on a construction project at the National Gypsum Gold Bond plant in Pryor, Oklahoma. The Respondent, a nonunion Company, employed electricians as part of its work force on this job.

[1] All subsequent dates refer to 1994 unless otherwise indicated.

2. The Sheppard Brothers' strike

Brothers Gene and Roy Sheppard worked for Respondent on the Pryor site as journeymen electricians. On April 25, they went on an economic strike to protest a written reprimand Roy had received for being out of his work area. The next day the brothers unconditionally offered to return to work. They were never recalled to work by the Respondent.

The Government alleges the Respondent violated the Act when it failed to recall the Sheppards to work when electrician job openings occurred. The Respondent candidly admits that it did not want to reinstate the brothers because it considered them to be poor workers. The Respondent notes that when Roy and Gene Sheppard went on strike they were immediately replaced by new employees. Thereafter the only persons hired were classified as ''leadmen.'' The Respondent contends the brothers were not qualified to perform the leadman job.

3. Respondent's hiring after the Sheppards' strike

On April 26, two journeymen electricians, Dale Hunter and Audie Strickland, were hired as replacements for the striking Sheppard brothers. They were paid at the journeyman rate of $15 per hour and performed duties as journeymen electricians. However, both men were initially designated on the Respondent's paycheck roster as leadmen.

Strickland, in uncontroverted testimony, stated that when he received his first paycheck he noticed he was listed as a leadman. He asked Supervisor Randy Beaver about his classification. Beaver stated, ''Oh, that's . . . where you've been classified because they don't want to hire any journeymen and bring Roy or Gene back.'' Strickland asked if that meant he would be paid more. Beaver said, ''No, it's just where you've been classified.'' Beaver did not testify. The Respondent's paycheck roster continued to list both Strickland and Hunter as leadmen through June 17. Respondent asserts this was a clerical error that was of no consequence.

The Sheppards were not recalled to fill any electrician vacancies that arose after their unconditional offer to return to work. Respondent's journeymen electricians, Rick King and John Harshaw, left their employment at the Gold Bond job after the strike. The Respondent did not replace them with individuals classified as journeymen. Rather, like Strickland and Hunter, the three subsequent hires were listed as leadmen. Unlike Strickland and Hunter they were paid the leadman rate of $15.75 per hour. A summary of the poststrike terminations and hirings shows the following:

Employee	*Classification*	*Hired*	*Terminated*
Dale Hunter	Journeyman (''mistakenly'' listed as Leadman)	April 26	
Audie Strickland	Journeyman (''mistakenly'' listed as Leadman)	April 26	
Rick King	Journeyman		April 28
Darryl Toon	Leadman	May 9	
John Harshaw	Journeyman		May 23
Don Cox	Leadman	May 23	
Lynn Holloway	Leadman	June 1	

The Respondent asserts that leadmen were hired instead of journeymen because they could do more complex work and would insure that the work got done as scheduled. The Respondent's witnesses testified that leadmen work was considered quality control work, doing more technical tasks, working with vendors, handling paperwork, and guiding others.

Holloway, the last electrician hired, testified that he was unaware that he was being employed as a leadman. He first learned of this designation when he heard himself referred to by that title the morning he started work. He was then told by Supervisor Mike Johnson that he would be working with Darryl Toon who is ''going to be your leadman.'' (Tr. 52.) Holloway opined that the work he performed for Respondent was not what he considered leadman duties but rather work commonly assigned to journeymen electricians. Holloway did not have any responsibilities directing the work of other employees. Holloway testified that he worked with Toon who directed his work. He considered Toon's guidance to be consistent with leadman work.

Strickland also observed the work of the leadmen. Strickland, although employed by Respondent as a journeyman, is an experienced electrician who has worked as an electrical superintendent. He likewise observed the leadmen were doing common journeyman electrician work and not tasks that he considered typical of a leadman classification.

The record as a whole does not support the Respondent's contention that ''leadmen'' were performing specialized work. Rather the evidence supports the conclusion that the ''leadmen'' hired after April 26 performed work that was substantially equivalent to that done by journeymen electricians. I do find, however, that the record supports the conclusion that Toon was a leadman because of his direction of Holloway's work. Toon is the only exception.

4. The Sheppard Brothers' work histories

The Respondent alternatively argues that the Sheppards are not entitled to recall even if the employees hired after the strike are found not to be legitimate leadmen. The Respondent bases this assertion on its belief the brothers were unsatisfactory workers. Respondent notes that Roy had been warned about wandering outside of his work area. Supervisor Johnson testified he considered Roy satisfactory as to quality of work but a mediocre producer who did not get along well with others. Roy had worked for the Respondent in the past. He had been recalled from a general layoff that had earlier occurred on the Gold Bond project. He was never discharged by the Respondent.

Respondent alleges that Gene was also a poor worker because he would stand around without working. Respondent concedes he was never disciplined for this behavior. He likewise had been recalled from layoff by the Respondent. He was never discharged by the Respondent.

5. Analysis of the Sheppard Brothers Not Being Recalled to Work

It is well established that on an unconditional offer of reinstatement economic strikers are entitled to return to their former jobs, or if their jobs are unavailable, to substantially equivalent positions. *Laidlaw Corp.*, 171 NLRB 1366, 1369–1370 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970); *NLRB v. Fire Alert Co.*, 566 F.2d 696, 697 (10th Cir. 1977). A refusal by an employer to reinstate economic strikers violates the Act unless there are ''legitimate and substantial business justifications'' for refusing to rehire the strikers. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763, 765 (10th Cir. 1982).

An employer may not rely on the questionable qualifications of strikers as an excuse not to recall them. *Aluminum Welding Works*, 282 NLRB 396 (1986). (A desire to employ a ''faster'' worker does not meet the ''legitimate and substantial business justifications'' test.) The Board requires that such a determination be made by an on-the-job evaluation of the striker's work. The employer may take appropriate action if the striker does not meet the expectations for the job. *Little Rapids Corp.*, 310 NLRB 604 fn. 2 (1993).

Supervisor Beaver's uncontroverted statement that the Respondent was classifying electricians as leadmen in order to avoid hiring the Sheppards is significant. This evidence provides insight into Respondent's motivation for hiring only ''leadmen'' after the strike. Further the testimony of Strickland and Holloway of their observations that the ''leadmen'' were doing only journeymen work reinforces Beaver's comments. Likewise, ''leadman'' Holloway's uncontroverted testimony shows he was assigned to work under Leadman Toon. I find that the ''leadmen'' were doing journeyman work and that the Respondent has failed to establish that the Sheppards were unqualified to perform that work.

The Respondent alleges the brothers were poor workers. The Respondent, however, was tolerant enough of the Sheppards to employ them until they went on strike. Their alleged prestrike work deficiencies was not a legitimate excuse for refusing to rehire them. The Respondent must make that evaluation after the strikers are returned to work. *Little Rapids Corp.*, supra.

I find that the Respondent used the ''leadmen'' classification as a subterfuge to insulate itself from reinstating the Sheppard brothers. Regardless of Respondent's motivation it has not established that there was a legitimate and substantial business reason for refusing to recall the Sheppard brothers. The Respondent's failure to recall them is a violation of Section 8(a)(1) of the Act. *Midwest Solvents, Inc. v. NLRB*, supra. Counsel for the General Counsel concedes that the Government's theory of the violation is the failure to reinstate the Sheppards after they engaged in the protected activity of striking. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). There is insufficient evidence that the refusal to recall the strikers was based on any union activity. Therefore, I do not find that the failure to rehire them was additionally a violation of Section 8(a)(3) of the Act as alleged in the complaint.

6. Respondent's Rule Against Solicitation During Working Hours

Gary L. Bennett, Respondent's personnel vice president, testified regarding the company policy on employees engaging in union organizing during work. He stated, ''We wouldn't want organizing efforts going on during working time.'' Respondent does have a no-solicitation rule in its jobsite policy manual given to each employee. This rule prohibits solicitation during working time and states, ''Working time is the time when you are expected to be working but

does not include your lunch break.'' (R. Exh. 1, p. 2, No. 12).

Bennett also testified about the Respondent's practice of giving employees work breaks. He related that the practice was an informal one that permitted employees to take reasonable breaks in their discretion. He conceded that breaks were the employees' time when they could talk about whatever they wanted.

Employee Holloway testified that at lunchtime on June 6 he talked with apprentice Mike Cox about joining the Union. Later that day Supervisor Mike Johnson spoke to Holloway. According to Holloway's direct examination, Johnson said, ''[T]hat if I engaged in any kind of union activity as far as organizing or approaching people about joining the union, that I'd be down the road.'' In his affidavit given to the Board during the investigation, Holloway said Johnson told him he could not conduct union activities during ''working hours.'' On cross-examination Holloway was uncertain as to exactly what was said and conceded that Johnson ''must have'' said something about working time or working hours.

Supervisor Johnson admitted he learned from Cox that Holloway was talking about the Union. He then confronted Holloway about the matter. Johnson testified he told Holloway that company policy forbid any soliciting of any kind during ''working hours.'' He also told Holloway solicitation was permitted before work, during lunch, and after work.

A rule prohibiting employees' union solicitations during working hours is a violation of Section 8(a)(1) of the Act. *Our Way*, 268 NLRB 394–395 (1983). Johnson admitted that he said there could be no-solicitation during working hours. Although Johnson also said solicitation could occur during lunch, this is not a full statement of the employees' rights. It is an employer's obligation to clearly communicate that solicitation is permitted during breaks. *Essex International*, 211 NLRB 749, 750 (1974). This fact was not discussed with Holloway. Johnson's statement of the policy was a confusing mixture of the term of art ''working hours'' with an incomplete explanation of when solicitation could occur. I find, therefore, that the Respondent did violate Section 8(a)(1) of the Act when it orally promulgated and enforced the rule against union solicitation during working hours.

7. The Discharge of Virgil Lynn Holloway

Holloway was terminated on June 14. The Government alleges that the discharge was the result of Holloway's union activities. The Respondent asserts he was discharged for his poor attendance.

The Respondent's workday started at 7 a.m. Holloway was tardy on two occasions. The first time he was 10 minutes late. The second time, June 12, he did not report until 8:30 a.m. He was orally warned about each of these late arrivals. On June 13, Holloway did not report to work or call the Respondent to explain his absence. The Respondent had a policy that employees who were not going to be at work must call in before 9 a.m. and report their absence.

Absenteeism and tardiness were a common factor in the discharge of employees on the project. Respondent's records showed some 35 employees were discharged for that reason. (R. Exh. 10.)

8. Analysis of the Holloway Discharge

The Government contends that Holloway's absence was used by the Respondent as an excuse to terminate him because of his union activities. The record does not support this conclusion by the required preponderance of the evidence. Respondent had a practice of discharging employees for attendance problems. Holloway's termination is not unusual in light of his careless disregard to attendance. Being late by an hour and a half followed immediately the next day by an unexplained day-long absence is a serious matter. Holloway was shown to be neglectful by his tardiness and unreported absenteeism. I find that the evidence is insufficient to demonstrate that the Respondent discharged Holloway because of his union or other protected activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

CONCLUSIONS OF LAW

1. TIC-The Industrial Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Electrical Workers, AFL–CIO, Local Union 584 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by promulgating and enforcing a rule against employees discussing the Union during working hours.

4. Respondent violated Section 8(a) (1) of the Act by refusing to reinstate Gene Sheppard and Roy Sheppard to their former, or substantially equivalent, positions of employment.

5. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act except as here specified.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily refused to reinstate Gene Sheppard and Roy Sheppard it must offer them reinstatement to their former positions, without prejudice to their seniority or other rights and privileges or, if any such position does not exist, to a substantially equivalent position, dismissing if necessary any employee hired to fill the position, and to make them whole for any loss of earnings and other benefits they may have suffered, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). All reinstatement and backpay recommendations are subject to the procedures discussed in *Dean General Contractors*, 285 NLRB 573 (1987), and *Haberman Construction Co.*, 236 NLRB 79 (1978).

Respondent shall remove from its records all references to the unlawful refusal to recall strikers Roy Sheppard and Gene Sheppard and notify them in writing that this has been

done, and that Respondent will not rely on the refusal to recall them as a basis for future discipline.

On these findings of fact and conclusions of law, and on the entire record, I issue the following[2]

ORDER

The Respondent, TIC-The Industrial Company, Steamboat Springs, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and enforcing its rule against employees discussing the Union during working hours.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to Gene Sheppard and Roy Sheppard to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Respondent shall remove from its records all references to the unlawful refusal to recall strikers Roy Sheppard and Gene Sheppard and notify them in writing that this has been done, and that Respondent will not rely on the refusal to recall them as a basis for future discipline.

(d) Post at its facility in, Pryor, Oklahoma, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''